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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1825~~ 70-280

ROBERT SUMMERLIN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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October Term, 1970

No.

ROBERT SUMMERLIN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio, entered on March 3, 1971, which denied appeal as of right from the Court of Appeals, Huron County, Ohio (Sixth Appellate District of Ohio) for the reason that no substantial constitutional question exists therein, and affirmed petitioner's conviction for selling an obscene book. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on March 31, 1971. Said decision, in effect, affirmed the Court of Appeals finding that the book in question "69 Potion" was obscene.

OPINIONS BELOW

The Opinion of the Court of Appeals, Huron County, Ohio, Sixth Appellate District is printed herein as Appendix B. The Judgment Entry of the Supreme Court of Ohio is printed herein as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 United States Code, Sec. 1257 (3).

QUESTIONS PRESENTED

The constitutional questions involved were presented to the trial and appellate courts of Ohio, and to the Supreme Court of Ohio, and argued in petitioner's brief on appeal to the Supreme Court of Ohio, and raised at the earliest instance possible.

1. Is the literary publication to-wit, "69 Potion" protected by the First Amendment to the Constitution of the United States of America as material being not utterly without redeeming social value, being not patently offensive, and falling within the contemporary community standard as not appealing to prurient interests?

2. Did not the Supreme Court of Ohio, in refusing petitioner a review of the merits of the case, and of the literary material involved, contrary to the requirement of independent judicial determination as expressed by the Supreme Court of the United States in *Ohio v. Jacobellis*, 378 U.S. 184, thereby deprive him of the privileges and immunities guaranteed by the First and Fourteenth Amendments to the United States Constitution?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the Ohio Revised Code Sec. 2905.34 are set forth in Appendix E hereto.

STATEMENT OF THE CASE

On December 5, 1969, the petitioner who runs a small grocery store in Norwalk, Ohio was indicted by the Huron County, Ohio grand jury for unlawfully and knowingly selling an obscene book. (*see*, Appendix D) The book involved is entitled "69 Potion" and is made up primarily of written material with photographs interspersed. The facts at bar do not involve juveniles; pandering; or aggressive solicitation by the bookseller as found in *Ginzberg v. New York*, 383 U.S. 463.

This cause came on for trial before a three judge panel including the Honorable Robert J. Vetter, Robert J. Gavel, and Russell H. Kear. The prosecution did not prove a sale of any book by the petitioner on November 28, 1969 as set forth in the indictment. There was a complete lack of proof regarding scientier as well as a complete lack of proof establishing the criteria comprising obscenity. Nonetheless, the three judge panel after refusing petitioner's counsel's request for time to prepare and file a brief, before rendering a verdict, found appellant guilty and sentenced him one (1) to seven (7) years to the Ohio State Penitentary. Petitioner timely appealed to the Court of Appeals, urging reversal on several grounds, including those previously given in the trial court. The Court of Appeals affirmed the conviction in a two to one ruling, its opinion being set forth in Appendix B.

Appeal was then taken from the Court of Appeals to the Supreme Court of Ohio both as of right and on leave to certify the record. The Supreme Court of Ohio dismissed the appeal *sua sponte* for the reason that no substantial constitutional question exists. (Appendix A). The Supreme Court of Ohio reached this decision without a certification of the record, and without any possible examination of the literary material in question, which reposed with the Court of Appeals pending admission to the Supreme Court of Ohio. Petitioner argued, among other constitutional arguments heretofore indicated both by brief, and orally, before a Master Commissioner appointed by the Supreme Court of Ohio to conduct the jurisdictional hearing on his appeal before the Ohio Supreme Court, that the literary material in question was not and could not be considered as a matter of both law and fact prohibitable or punishable obscenity.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this case should be reversed on the authority of *Redrup v. State of New York*, 386 U.S. 767, and the companion cases decided May 8, 1967 by this Court. *Redrup*, supra and its companion cases have been reaffirmed numerous times by this Court within the past year. (*See, Hoyt v. Minnesota*, 399 U.S. 524; *Walker v. Ohio*, 398 U.S. 434; *Bloss v. Dykema*, 398 U.S. 278; *Cain v. Kentucky*, 397 U.S. 319; *Carlos v. New York*, 396 U.S. 119; *Childs v. Oregon*, 39 L.W. 3436). It is quite evident that a wide and disturbing variance exists between the Constitutional boundaries of both the definitive limits and standards of adjudicating obscenity as enunciated by this Court, and as applied by some state courts, particularly Ohio. (See, *Ohio v. Jacobellis*, 378 U.S. 184, *Ohio v. Mapp*, 170 O.S. 427, *Mapp v. Ohio*, 367 U.S. 643, *State of Ohio v. Mazes*, 7

O.S. 2d 136, *Mazes v. Ohio*, 388 U.S. 453) Yet, Ohio persists in enlarging the severely limited exception to full expression, labeled obscenity, to an almost total possibility of obliteration of sexuality as a subject of free expression. If the matter contains an indication of a sexual interest the prosecution becomes a *res ipsa loquitur* matter, coupled with an apparently deliberate and studied avoidance of the application of the rule of *stare decisis*. The possibility of a prurient reaction becomes the sum and substance of a state's case.

Hardly chastised by the requirements of appellate review of the proscribed material under the authority of *State of Ohio v. Jacobellis*, 378 U.S. 184, the Supreme Court of Ohio not only finds no substantial debatable constitutional question involved, but reaches that perfunctory ruling without even admitting the case for review. It is difficult to comprehend how an independent judgment in applying constitutional standards and criteria to constitutional issues can be made, under the obligation imposed by *Jacobellis*, supra in the absence of a formal review of the literary material in issue.

Ohio has seemingly revenged its reversal in *Jacobellis* and *Walker v. Ohio*, 398 U.S. 434 by enlarging the standards in *Roth v. United States*, 354 U.S. 476, thus, in effect, putting obscenity beyond the pale of protection of the First Amendment, by creating a doctrine that if the dominant theme is female sexual attractiveness the matter and its disseminator are apparently beyond the protection of all constitutional safeguards.

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

It is submitted that the Ohio trial court and Court of Appeals have decided federal questions of substance in

a way not in accord with applicable decisions of this Court. By the ruling of the trial court below, a small town grocery store owner has been subjected to a severe sentence of one (1) to seven (7) years imprisonment in the Ohio State Penitentiary. The effect of the affirmance of the judgment of conviction in the trial court is the suppression of one (1) paperback book. This punishment and suppression has been imposed despite the claim that the literary material at issue is entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution.

It is submitted that the paperback book involved herein is entitled to constitutional protection. The writing is comparable to the many publications which have been held to be not obscene and protected by the guarantees of the First Amendment. Depiction of sex in the book herein is well within contemporary community standards. The writings do not appeal to a morbid or shameful interest in sex and they cannot be deemed to be utterly without social value. The book has a plot, characters, and characterizations.

The right of an adult reading public to access of the book, and to a broad area of comparable material appears plain in light of the guarantees of the First Amendment. This case does not involve a statute nor any evidence whatsoever reflecting a "specific and limited state concern for juveniles," nor does it involve any "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," nor was the display of this book, the sort of "pandering" which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463. This book is clearly not "hard-core pornography" as both the trial court and Court of Appeals erroneously labeled them. *Ginzburg v. United States*, 383 U.S. 463, 499 fn. 3; and *Redrup v. New York*, 386 U.S. 767, 770-771.

The decisions of this Court, and other courts, in the federal as well as state jurisdictions, have emphasized that sex and obscenity are not synonymous, that obscenity is not a matter of taste, nor of good or bad literature, nor good or bad art; that the constitutional protection exists for books and other material which are entertaining or informing. Books may not be suppressed because they are deemed sacrilegious or immoral or harmful or non-educational or non-amusing. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495; *Gelling v. Texas*, 343 U.S. 960; *Superior Films, Inc. v. Department of Education of Ohio (Commercial Pictures Corp. v. Regents of New York)* 346 U.S. 587; *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870.

It has been recognized that in a pluralistic society guarantees of the free speech and press provisions of the First Amendment afford the broadest freedom for all segments of the adult population; that the right to read, and the right to know, enjoy the most extensive protection; and that limitations upon these fundamental rights are extremely narrow. A book may not be suppressed unless it is absolutely worthless; unless it goes substantially beyond contemporary community standards; and unless it appeals to a shameful or morbid interest in sex. These independent elements must coalesce and must be established without weighing one element against the other before suppression can be justified. *Memoirs v. Massachusetts*, 383 U.S. 413.

It has been repeatedly held that material can no longer be found to be obscene merely because the material deals with some aspects of sex, such as lesbianism, homosexuality, prostitution, adultery, fornication, flagellation, cunnilingus, fellatio, or other sexual activities. The aforementioned sexual activities are not in themselves sufficient grounds for denying such material a constitutional protection of the First Amendment. (See,

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684.)

In the light of the foregoing, the book herein involved is in all respects comparable to the multifold writings and photography which has been held to be entitled to constitutional protection by this Court. Thus, in *Redrup v. New York*, 386 U.S. 767, 770, distribution of the books "Lust Pool" and "Shame Agent" was held "protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam* or *in rem*. These books were held entitled to constitutional protection although the writings dealt candidly and explicitly with such themes as heterosexual intercourse, sadism, intercourse under the influence of drugs, cunnilingus, rape, fellatio, orgy and lesbianism.

In *Aday v. United States*, 388 U.S. 447, the book involved was a writing entitled "Sex Life of a Cop." The Court of Appeals, in describing the book, stated,

> "Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practised skill of the author runs out of fresh imagery and dully repeats his supply of luring adjectives . . . We cannot believe that the First Amendment's great guaranty of freedom of expression can be elasticized to embrace Sex Life of a Cop . . . May we then, exercising the common sense which we like to think is a mark of today's Federal Judges, say that we know hard-core pornography when we see it, and Sex Life of a Cop is just that." 357 F.2d 855, 858. (Sixth Cir. 1966).

Based upon the decision in *Redrup*, this Court reversed.

In *Books, Inc. v. United States*, 388 U.S. 449, the book involved was "Lust Job." The lower court described the book as "a tale exclusively devoted to the sexual adventures of its principal character. Adulteries, seductions, and orgies are the only events of importance. The context described include not only sexual intercourse but sodomy and other perversions." 358 F.2d 935, 966 (First Cir. 1966). This Court reversed the judgment of conviction based on *Redrup*.

In *Quantity of Copies of Books v. Kansas*, 388 U.S. 452, this Court upheld a declaratory judgment, contrary to the decision of the Kansas Supreme Court (197 Kan. 306, 416 P.2d 703, 1966), holding that the following books, in the light of the *Redrup* decision, were not obscene and were entitled to constitutional protection: "Sin Hooked," "Bayou Sinner," "Lust Hungry," "Shame Shop," "Flesh Pot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," and "Flesh Avenger."

The Kansas Supreme Court described the aforementioned books in this manner:

> "The format is the same in all the books–paperback–obviously mass produced, exactly 190 pages in length, strong sex and perversion with repetitive regularity in each chapter, literally appealing to pruriency from cover to cover." *State v. A Quantity of Copies of Books*, 197 Kan 306.

The Kansas Supreme Court continued the description of the eleven (11) paperback books before them by quoting in its opinion a description given by this Court in *Mishkin v. State of New York*, 383 U.S. 502 at 505, which read:

> "Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations, but more depict such deviations as sodomasochism, fetishism, and homosexuality. Many have covers with drawings of scantly clad women being whipped, beaten, tortured, or abused. Many if not most are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be 'full of sex scenes and lesbian scenes . . . (T)he sex had to be very strong, it had to be rough, it had to be clearly spelled out . . . I had to write sex very bluntly, make the sex scenes very strong . . . (T)he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men . . . (H)e wanted scenes in which women were making love with women . . . (H)e wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to men and women . . . making love to men, and there were spankings and scenes . . . sex in an abnormal and irregular fashion.' "

The Kansas Supreme Court concluded:

> "The writer of the foregoing could well have been discussing the eleven books in the instant case, as reflected by the lucid illustrated covers as well as the printed pages."

As stated, despite this sordid description, this Court in *Quantity of Copies of Books*, supra, reversed, citing *Redrup*, supra.

In *Keney v. New York*, 388 U.S. 440, a judgment of conviction under the State obscenity statute was reversed, based upon the decision in *Redrup*. The books involved were entitled "Sin Servant," "Lust School," and "Lust Web."

In *Friedman v. New York*, 388 U.S. 441, the State judgment of conviction was reversed on the basis of the ruling in *Redrup*. There were several publications, all of which had been described by the State Court as obscene, sadistic, and masochistic.

In *Mazes v. Ohio*, 388 U.S. 453, the Ohio judgment was reversed by this Court based on the decision in *Redrup*. The book involved was "Orgy Club." The Ohio Supreme Court described "Orgy Club" as one whose "theme aside from a most tenuous plot deals with constant, casual and colorful fornication spiced here and there with bits of sadism" *Mazes v. Ohio*, 209 N.E. 2d 496.

In *Sheperd v. New York*, 388 U.S. 444, the Court reversed the judgment of conviction, based on the decision in *Redrup*. Involved were sets of photographs and the following books: "Promenade Bondage," "Spanking Nurses," "Spanking Sisters," and "Bondage," alleged to be obscene, in violation of the New York Obscenity Law.

In *Avansino v. New York*, 388 U.S. 446, the publication involved was "Promenade Bondage, Vol. IV," which was described by the State Court as obscene, sadistic, and masochistic. Reversal of the judgment of conviction was based upon the decision in *Redrup*. (*See* also, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, Rvsg, 156 So. 2d 537 (1963) ("Tropic of Cancer"); *Tralins v. Gerstein*, 378 U.S. 576, Rvsg. 151 So. 2d 19 (1963) ("Pleasure Was My Business"); *Memoirs v. Massachusetts*,

383 U.S. 413, Rvsg. 349 Mass. 69, 206 N.E. 2d 403 (1965) ("Fanny Hill")).

The Supreme Court of Georgia in concluding that the book "Sin Whisper" was obscene remarked that:

> "... the book ... is composed substantially of lengthy, detailed, and vivid accounts of preparation for and acts of normal and abnormal sexual relations between and among its characters." *Corinth Publications, Inc. v. Wesberry*, 146 SE 2d 764, at 768.

This Court reversed. *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448.

The First Circuit Court of Appeals ruled that the paperback "Lust Job" was obscene because it was a "tale exclusively devoted to the sexual adventures of its principal characters; adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse but sodomy and other perversions." *Books, Inc. v. United States*, 358 F.2d 935 at 936. This Court reversed, citing *Redrup*, supra. *Books, Inc. v. United States*, 388 U.S. 449.

Only recently in *Hoyt*, supra this Court found the following books to be protected by the free speech and press provisions of the Constitution; "The Way of a Man with a Maid", "Adam and Eve", "Business as Usual", "Lady Susan's Cruel Lover", and "True Love Story of Growing Up". The ruling reached by this Court was made despite the following description given by the Minnesota Supreme Court;

> "... in light of the case law, the dominant theme of the material appeals to the prurient interest of the average person and, applying contemporary community standards, is

> patently offensive and utterly without redeeming social importance. It is unnecessary to discuss the details of these books further than to observe that the theme of each is pointless save as it serves to relate the characters to repeated accounts of lewd and degrading episodes. They deal with filth for the sake of filth. In answer to the appellant's assertion that the convictions are unsupported by evidence bearing upon the social value of the books and their acceptance by the community standards, it can only say that such evidence would add nothing. The material speaks for itself. It is not obscene, the word has lost all meaning. We identify it for what it is and hold that it is obscene as a matter of law."

Again in *Childs*, supra this Court reversed the Court of Appeals for the Ninth Circuit, (*see, Childs v. Oregon*, 431 F.2d. 272), which had ruled the paperback book "Lesbian Roommate" obscene. In *Childs*, supra the defendant so involved was found guilty of selling an obscene book. Said decision was affirmed by the Oregon Supreme Court. Defendant then filed a petition for a writ of certiorari in this Court which was denied. He then sought federal habeus corpus. As can be garnered from the decision of the District Court, the Oregon Supreme Court ruled that the paperback book "Lesbian Roommate" was obscene because "it affronts contemporary standards relating to the description or representation of sexual matters. Specifically, the Court relied on a homosexual act between two women where one is having osculatory realtions with the private parts of the other and is greedily making sirupy noises." (*Childs*, 300 F. Supp. at 650). The District Court ruled the paperback book "Lesbian Roommate", which concerns lesbian activities, oral genital relations and a sexual episode of a

man with four women, not obscene. However, as stated the Ninth Circuit Court of Appeals reversed the District Court. But again, this Court affording "ceaseless vigilance" in the protection of First Amendment rights overruled the Ninth Circuit Court of Appeals.

Again only recently in a case which is almost identical to the case at bar, this Court citing *Redrup*, reversed the Ohio Supreme Court which had denied certification, and affirmed the lower courts ruling of obscenity of the books therein involved. (*See, Walker v. Ohio*, 398 U.S. 434). In *Walker*, supra, four books were involved (two paperbacks and two magazines) entitled "Lurid Sinner," "Sin Crop," "Nifties, Vol 195" and "Peek-A-Boo, No. Four". The aforementioned books were ruled obscene by the trial court, and this decision was affirmed on appeal. The Court of Appeals in *Walker*, in language identical to the language of the Court of Appeals at bar, concluded;

> "that if this material contained in the above, and especially "Lurid Sinner," is not "hardcore pornography" then that phrase is incapable of definition".

Appeal as of right was taken to the Ohio Supreme Court, as at bar, but the Ohio Supreme Court, as at bar, refused to certify the case. Appeal was then taken to this Court and relief was finally granted. Not only is *Walker*, supra, identical to the case at bar procedurally but the books involved in *Walker*, supra, are indistinguishable in content from the book at bar, thereby necessitating this Courts relief.

Lower federal courts and state courts applying the aforesaid constitutional standards and criteria for judging obscenity in the light of the guarantees of the First Amendment and the decisions of this Court, have also held material similar to that at bar to be not obscene.

In *Grant and Wissman v. United States*, 380 F.2d 748 (9 Cir. 1967) the judgments of conviction under an obscenity indictment were reversed and the indictments directed to be dismissed. The books involved were entitled: "Swish Bottom!," "Screaming Flesh," and "The Holdout," and were described by the Court of Appeals "as obscessed with 'sex' and 'junk.'" The Court held that the books were nevertheless entitled to constitutional protection and that they were "obviously about the same as dealt with in *Redrup v. New York*" and the other decisions of this Court as aforementioned. 380 F.2d at 748.

In *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968), the court found the following books to be entitled to constitutional protection: "Lesbian Sin Song," "Two Women in Love," "Pleasure House," "Lesbian Alley," "The Three-Way Apartment," and "The Affairs of Gloria." In holding the books to be not obscene, the court stated:

> "It is far better there be a tight rein on authoritarian suppression, nothwithstanding a conflict with some individuals' tastes or customary limits of candor, than that we live in a stifled community of self censorship where men must feel apprehension, over expression of an unpopular idea or theme."

The photography portions of the book in question cannot be distinguished from the type of photographs found to be protected by numerous decisions of this Court resting on *Redrup*, supra. (*See, Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47).

In *Central Magazine Sales*, supra, this Court gave protection to photographs not dissimilar to those

involved herein. The description of these magazines by the lower Federal Court was as follows:

> "In some of the pictures the women are wearing garter belts and silk stockings, which focus attention on the pubic area. In some of the pictures the models posed in lewd attitudes and positions. In several pictures the women are chained to a chair and their wrists are bound . . .". *United States v. Copies of a Magazine Entitled "Exclusive"*, 373 F.2d 663.

The lower Court continued its description of these magazines in detail and concluded that they were calculated to appeal to the prurient interests of the readers. Describing the pictures of women that are portrayed completely in the nude, the Court notes: "Some of the seated models, squarely facing the camera, have their knees and legs wide-spread in order to reveal the genital area in its entirety." Despite the lower Court's description, this Court reversed and ruled that the material was not obscene.

In *United States v. Potomac News Co.*, 373 F.2d 635, the court found obscene, publications consisting mainly of photography. In that decision, the court described pictures similar to those in question herein, as having no redeeming value, producing a feeling only of "revulsion and appealing solely to the prurient interest of a great many members of the population." In a per curiam decision, this Court reversed (*Potomac News*, supra). The authority for the reversal in both cases as noted by the Court was simply *Redrup*, supra.

Motion pictures depicting scenes similar to those in question have also been brought within the ambit of First Amendment protections. (*See, Cain v. Kentucky*, 397 U.S. 319; *Robert-Arthur Management Corp. v.*

Tennessee, ex rel. Canale, 389 U.S. 578; *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573; *Schackman v. California*, 388 U.S. 454).

This Court in *Robert-Arthur Management Corp.*, supra, reversed the State Supreme Court of Tennessee which had ruled the film "Mondo Freudo" and the "movie trailer" "Olgas Girls" obscene. The Tennessee Supreme Court said in commenting on the films:

> "This film, considered as a whole, not only predominately appeals to the prurient interest, it in fact has no other possible appeal. If this film is not patently offensive to the public or does not go substantively beyond customary limits of candor in dealing with sex, then we do not think it is possible to make such a film." *Robert-Arthur Management Corp. v. Tennessee ex rel. Canale*, 414 SW 2d 638 at 643.

Despite this descriptive account rendered by the Tennessee Supreme Court, this Court reversed its decision and held the films to be Constitutionally protected. (*See, Robert-Arthur*, supra).

This Court in *Schackman*, supra citing *Redrup*, supra overruled the lower Federal Court which ruled obscene the movies before them. (*See, Schackman v. Arnebugh*, 258 F. Supp. 983). The lower Federal Court described one of the films before them, 0-12 as follows:

> "The film consists of female model clothed in white blouse open in the front, a half bra which exposes the upper half of the breast including the nipples and a pair of white capri pants which are soon discarded under which the model wears a pair of sheer panties through which the pubic hair and region are

> clearly visible. The film consists of the model moving and undulating upon a bed moving her hands, lips, and torso all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story line or dancing other than exaggerated body movements. In at least three occasions the female by lip articulations is observed to say "fuck you, fuck me." The dominant theme of the film taken as a whole obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hairs and the outline of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance."

The Second Circuit Court of Appeals in *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 573, held that:

> "... a film dealing with acts of sodomy, self-mutilation, homosexuality, and prostitution ... was not 'obscene'."

Petitioner is cognizant of the heavy burden placed upon this Court due to its ever increasing caseload. However, despite this Court's caseload and its desire to insure the workings of the "Federal System" (*See, Younger v. Harris*, 39 L.W. 4201; *Samuels v. Mackell*, 39 L.W. 4211), this Court must not stop its "ceaseless vigilance" to protect non-obscene works and their purveyors. This Court must review at first instance obscenity convictions especially in cases such as this, where Ohio's highest court refused to even review the material in question.

If this Court denies certiorari, in effect it will prolong the appeal at bar in which event this case again could come to rest in this Court, adding to the Court's already heavy caseload. (*See, Childs,* supra; *Hunt v. Keriakos,* 428 F.2d 606).

Admittedly, the protraction of petitioner's appeal does not constitute good reason alone to grant certiorari. However, in light of all the cases as aforementioned it is apparent that the paperback book "69 Potion" is not obscene. With these cases in mind, and this Court's adherence to the "ceaseless vigilance" proposition, it is imperative that this Court grant relief, as it has so many times in the past. This Court must reverse the ruling of the Ohio Supreme Court which adheres to the proposition of "no vigilance" in cases dealing with obscenity.

2. THE DECISION BELOW DENIED PETITIONER OF PRIVILEGES AND IMMUNITIES GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENT BECAUSE OF THE OHIO SUPREME COURT'S REFUSAL TO CERTIFY THE CASE AT BAR.

This Court fully identified and underscored its obligation to reach an independent judgment in applying constitutional standards and criteria to constitutional issues, that may be cast by lower courts in the form of determinations of fact, especially to findings of obscenity by juries, trial courts, and administrative agencies.

Significantly, it was in another Ohio case, *Jacobellis v. Ohio,* 378 U.S. 184, wherein, at page 188, it was clearly stated that:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene

> necessarily implicates an issue of constitutional law. *See, Roth v. United States,* supra, 354 U.S., at pages 497, 498, 1 L. ed 2d at 1514, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id. at 498, 1 L. ed 2d at 1415; see *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488, 8 L. ed 639, 647, 82 S. Ct. 1432 (Opinion of Harlan, J.)"

And further, at page 190 of *Jacobellis*, it was succinctly stated:

> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees a free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Jacobellis, supra, was not the first instance wherein this Court recognized and applied this vital act of independent judicial review of the material in issue, be it literary or film. *Times Film Corp. v. City of Chicago,* 355 U.S. 55; *One, Inc. v. Olesen,* 355 U.S. 371; *Sunshine Book Company v. Summerfield,* 355 U.S. 372.

The book in issue reposed, as was previously stated, in the Court of Appeals during the entire period that petitioner's appeal to the Supreme Court of Ohio was pending. At no stage of the appeal pending in the State Supreme Court, did the said Court undertake to examine the paperback book involved so as to make its own determination as to whether such material was of the

type and nature that fell outside of the protection of the First Amendment. The Ohio Supreme Court dismissed the appeal sua sponte, stating that no constitutional question was involved. Petitioner's application for rehearing was denied thereby affirming, procedurally speaking, the conviction of the petitioner without taking the slightest notice of, or making even a cursory perusal of the paperback in issue. Petitioner was thus denied a determination of a constitutional question of obscenity by the Ohio Supreme Court because of the refusal and failure of the Supreme Court of Ohio to shoulder a task of review which this Court has never shirked in the innumerable appeals by convicted petitioners in obscenity cases.

CONCLUSION

Therefore, in consideration of the foregoing, a Writ of Certiorari should issue to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

MERRIT GREEN II
330 Spiter Building
Toledo, Ohio

Of Counsel:
Law Offices of Jack Gallon

TED IORIO
435 S. Hawley
Toledo, Ohio

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1971 TERM
City of Columbus.	)	To Wit: March 3, 1971
	)	
State of Ohio,	)	
Appellee,	)	
	)	No. 70-642
vs.	)	APPEAL FROM THE
	)	COURT OF APPEALS
Robert Summerlin,	)	
Appellant.	)	for Huron County

This cause, here on appeal as of right from the Court of Appeals for Huron County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Huron County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ___ day of _____ 19___

_____ _____ Clerk

_____ Deputy

APPENDIX B

IN THE COURT OF APPEALS OF HURON COUNTY, OHIO

State of Ohio,	)	
	)	C.A. No. 809
Plaintiff-Appellee	)	
	)	C.P. No. 35578
vs	)	
	)	MEMORANDUM
Robert Summerlin,	)	OPINION
	)	Decided July 29, 1970
Defendant-Appellant	)	

• • •

Appeal on Questions of Law.

Mr. Ronald H. Freeman, for Plaintiff-Appellee.

Mssrs. Jack Gallon and Ted Iorio, for Defendant-Appellant.

McLAUGHLIN, J. This matter came on to be heard by this court on defendant-appellant's Assignments of Error and oral arguments by counsel for the respective parties. The court has thoroughly examined the record and briefs and we find no error prejudicial to defendant-appellant and each of the assigned errors is overruled.

We have read and examined State's Exhibit 1 entitled "69" Potion and in our independent judgment it is our finding that if the material contained in the above is not "hard core pornography" then that phrase is incapable of definition.

It is our finding from a thorough examination of the record and State's Exhibit 1 that the judgment of the Common Pleas Court of Huron County is affirmed.

Judgment affirmed. Entry to be submitted accordingly.

Judgment affirmed.

STRAUB, J., concurs.

HONORABLE D. DEANE McLAUGHLIN (Retired) sitting by designation in the Sixth Appellate District.

GUERNSEY, J., dissenting. I reluctantly dissent from the opinion and the judgment.

Having undergone the disagreeable task of reading the subject paperback book I concur with the conclusion implicit in the finding expressed in the majority opinion that the photographs and textual matter therein, when considered together or apart, constitute hard core pornography.

It is difficult to determine from the various cases decided by the Supreme Court of the United States on the subject, including the latest case, State of Ohio v. Walker, ____ U.S. ___, ___ L. Ed. ___, ___ S.Ct. ___, decision announced June 15, 1970, whether there exists a common denominator of opinion among the justices participating and concurring therein who are now members of the Court. See, for example, Requiem for Roth, 68 Mich. L. Rev. 185. However, it must be concluded from the consistent and controlling application by the Court of the case of Redrup v. State of New York, 386 U.S. 767, 87 S.Ct. 1414, in finding constitutional protection under the First and Fourteenth Amendments to the Constitution of the United States of paperback books at least as offensive as the book herein, that whether or not the material in such books constitutes hard core pornography, the distribution of same is protected by the First and Fourteenth Amendments unless (1) the statute in question in its application to the offense charged reflects a specific and limited state

concern for juveniles, or (2) there is suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) there is evidence of the sort of "pandering" which the Court found signficant in Ginzberg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d. 31. As none of these three elements are involved in the case before us we are required to follow the law of the land as expressed by the Supreme Court and we should, therefore, determine that the sale herein was constitutionally protected. In doing so we would give neither explicit nor implicit moral approval to the transaction.

GUERNSEY, J., of the Third Appellate Judicial District, sitting by designation in the Sixth Appellate Judicial District.

APPENDIX C

IN THE
COURT OF COMMON PLEAS
OF HURON COUNTY, OHIO

THE STATE OF OHIO,	:	
	:	
vs.	:	No. 35578
	:	
Robert Summerlin,	:	JOURNAL ENTRY
	:	
Defendant	:	

The defendant herein, having been convicted of unlawfully selling an obscene book, a violation of Section 2905.34, R.C., was this day brought before the court, and being informed of the verdict of the court, was inquired of if he had anything to say why judgment should not be pronounced against him, and having said what he wished to say;

IT IS THEREFORE ORDERED and ADJUDGED by the court, that the defendant, Robert Summerlin, be imprisoned and confined in the Ohio State Penitentiary at Columbus, Ohio, for a period of not less than one (1) year, nor more than seven (7) years, and that he pay the costs of this prosecution, for which execution is awarded.

Approved:

_____
JUDGE

_____
Ronald H. Freeman,
Assistant Prosecuting Attorney

_____
JUDGE

_____
Attorney for Defendant.

_____
JUDGE

APPENDIX D

INDICTMENT

THE STATE OF OHIO) COURT OF COMMON
Huron County, ss.) PLEAS

Of the Term September in the year of our Lord, one thousand nine hundred and sixty-nine

The Jurors of the Grand Jury of said County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Robert Summerlin late of said County, on or about the 28th day of November in the year of our Lord one thousand nine hundred and sixty-nine at the County of Huron aforesaid,* did unlawfully and knowingly sell obscene, lewd or lascivious books, knowing the same to be obscene, lewd or lascivious books.

Contrary to section 2905.34 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

/s/
Prosecuting Attorney

*Revised Code, Sec. 2941.08, Art. 4, Sec. 20, Const.

The State of Ohio, _____ Huron _____ County.

I, the undersigned, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the original indictment, together with the endorsements thereon, now on file in my office.

WITNESS my hand and the seal of said Court, at Norwalk Ohio, this 5th day of December 1969

Dana W. Call
Clerk
By /s/ Florence J. Lee
Deputy

APPENDIX E

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(R. C. 2905.34)

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements,

photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed, a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines or pictures."

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IN THE

Supreme Court of the United States

_____ TERM, 1971

No. 70-280

STATE OF OHIO,

Respondent,

vs.

ROBERT SUMMERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERNARD W. FREEMAN,
Prosecuting Attorney,
Huron County, Ohio,
The Home Savings and
Loan Building,
Norwalk, Ohio 44857,

and

RONALD H. FREEMAN,
Assistant Prosecuting Attorney,
Huron County, Ohio,
The Home Savings and
Loan Building,
Norwalk, Ohio 44857.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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IN THE

Supreme Court of the United States

_____ TERM, 1971

No.

STATE OF OHIO,

Respondent,

vs.

ROBERT SUMMERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARGUMENT

The literary publication, to-wit: "69 Potion", is not protected by the First Amendment to the Constitution of the United States of America, being material utterly without redeeming social value, being patently offensive, and falling below the contemporary community standard in appealing to prurient interests.

This Court has in *Redrup v. New York*, 368 U. S. 767 (1967), set forth the tests which the triers of fact must

apply in determining whether a book is or is not constitutionally protected by the First Amendment provision pertaining to freedom of the press. The tests are as follows, *Redrup, supra,* pp. 770 and 771:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value emphasizing that 'the three elements must coalesce' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value.' "

Petitioner in seeking review by this Court is asking that it be determined that the book "69 Potion" does not meet these tests. In support of this contention petitioner cites a number of cases involving other books which have been reversed by this Court, most without opinion, citing *Redrup, supra,* as authority for the reversal.

No one can dispute that a book, a motion picture, or a picture is a unique thing, and that each book must stand or fall as far as the test of obscenity is concerned on its own contents. Petitioner has failed to cite a case where any court in the United States has found the book, "69 Potion", not obscene.

It is submitted that this court cannot say that reasonable minds could only come to the conclusion that the book, "69 Potion", was not obscene under the *Redrup* test as the triers of fact have found.

Petitioners urge that the failure of the Supreme Court of Ohio to make an independent judicial determination on the question of the obscenity of the material involved denied petitioners the rights of the First and Fourteenth

Amendment. Acceptance of this contention would have the effect of requiring a trial de nova at every level of appeal. This procedure would not only subject the Courts to a tremendous burden, but would also result in a deplicity of process never intended by this Court in setting forth the opinion in *Jacobellis v. Ohio*, 278 U. S. 184, in which the Court noted at page 189, citing Lockhart and McClure, Censorships of Obscenity; The Developing Constitutional Standard, 45 Minn L. Rev. 5, 116 at page 119:

> "If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

The triers of fact in this case was a three judge panel which decided without dissent that the material involved failed to meet the *Redrup* tests of permitted material. The Court of Appeals of Huron County made the finding that "in our independent judgment" the material involved was hard core pornography. (Petitioner's Appendix B, page B-1). The dissenting judge in the 3-2 decision also concurred with the conclusion that "the photographs and textual matter therein, when considered together or apart, constitute hard core pornography". (Petitioner's Appendix B, page B-2).

CONCLUSION

In light of the fact that five of six judges who had an opportunity to make an independent judicial determination of the material and that they have all reached the same conclusion, it is apparent that petitioner's contention that the Supreme Court of Ohio deprived him of the

privileges and immunities of the First and Fourteenth Amendment by dismissing the appeal for want of a substantial constitutional question, is without merit.

Respectfully submitted,

BERNARD W. FREEMAN,
Prosecuting Attorney,
Huron County, Ohio,

and

RONALD H. FREEMAN,
Assistant Prosecuting Attorney,
Huron County, Ohio.